Office-Supreme Court, U.S.
FILED
OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 81-97 and 81-323

In the Supreme Court of the United States

OCTOBER TERM, 1981

A.O. SMITH CORPORATION, PETITIONER

v.

DARREL C. NOTTELSON AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,
PETITIONER

v.

DARREL C. NOTTELSON AND
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED *

(1) Whether Section 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), which mandates reasonable accommodation of religious practices, requires unions and employers to exempt religious objectors from union dues requirements unless undue hardship can be shown.

(2) Whether Section 701(j) of Title VII violates the Establishment Clause of the First Amendment.

(3) Whether the court of appeals correctly affirmed the district court's finding that A.O. Smith Corporation could reasonably have accommodated Nottelson's religious objection to union dues payments without undue hardship.

* Petitioner in No. 81-97 also seeks review of the holding of the court of appeals with respect to an award of attorney's fees, upon which question the Commission expresses no view.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22)[1] is reported at 643 F.2d 445. The mem-

[1] "Pet. App." refers to the appendix to the petition in No. 81-97. "Pet. Supp. App." refers to the supplemental appendix to the petition in No. 81-97. "A." refers to the joint appendix filed in the court of appeals.

orandum opinions of the district court of December 7, 1979 (Pet. Supp. App. B-1 to B-18) and April 18, 1980 (Pet. Supp. App. B-25 to B-44) are reported at 481 F. Supp. 756 and 489 F. Supp. 94. The district court's memorandum opinion of September 18, 1980 (Pet. Supp. App. B-45 to B-53) is not reported. An earlier memorandum opinion of the district court, entered on December 20, 1976, is reported at 423 F. Supp. 1345.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1981, and petitions for rehearing were denied on April 20, 1981 (Pet. Supp. App. E-1 to E-2). The petition for a writ of certiorari in No. 81-97 was filed on July 15, 1981. In No. 81-323, Justice Stevens extended the time for filing the petition for a writ of certiorari to and including August 18, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are set forth in the petition in No. 81-323 (Pet. 2-4). Also relevant is Section 19 of the National Labor Relations Act, Pub. L. No. 96-593, 94 Stat. 3452 (to be codified at 29 U.S.C. 169), which provides:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees'

employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

STATEMENT

1. Darrel C. Nottelson, a member of the Seventh Day Adventist Church, brought this Title VII employment discrimination action in the United States District Court for the Eastern District of Wisconsin. Nottelson, a long-time employee of A.O. Smith Corporation, claimed that his employer and Smith Steel Workers, D.A.L.U. 19806, AFL-CIO, the bargaining agent for A.O. Smith's employees, had discriminated against him because of his religion, in violation of Sections 701(j) and 703(a) and (c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(j), 2000e-2(a) and (c), by causing him to be discharged from his employment when he refused, because of his religious convictions, to pay union dues (Pet. App. A-2 to A-4).

The collective bargaining agreement between Local 19806 and A.O. Smith contains a union security clause requiring union membership as a condition of employment (Pet. App. A-2; A. 419-420). Nottelson was

first employed by A.O. Smith in 1947, and he joined the union at that time (Pet. App. A-2). In May 1966, Nottelson became a member of the Seventh Day Adventist Church, which teaches that it is morally wrong to be a member of, or pay dues to, a labor union (*ibid.*). In December 1974, at a meeting also attended by a representative of the Seventh Day Adventist Church, Nottelson advised Local 19806 president Paul Blackman that he objected to the payment of union dues because his sincerely held religious beliefs prevented him from supporting labor unions (*ibid.*; A. 188-190, 269). Nottelson and the church representative proposed that Nottelson be allowed, in lieu of paying dues, to donate an equivalent amount to a mutually agreeable non-religious charity (A. 190). Nottleson's representative also informed Blackman of various accommodations that other labor organizations had made in similar circumstances (A. 192-198; see also A. 337-346). Nottelson and his representative also called to Blackman's attention an AFL-CIO Executive Council statement urging all affiliated unions to "adopt procedures for respecting sincere personal religious convictions as to union membership" and "to insure that this policy is fully and sympathetically implemented by all local unions" (A. 199, 430; see Pet. App. A-10).

On January 1, 1975, Nottelson ceased paying union dues and began paying an equivalent amount to the American Cancer Society, without the assent of the union (Pet. App. A-2). Thereafter, on April 15, 1975, Nottelson was expelled from the union, which then requested his discharge by A.O. Smith, pursuant to the collective bargaining agreement (Pet. App. A-3; A. 436-438).

Nottelson's employer apparently learned of the controversy on March 11, 1975, when Nottelson and his

church representative informed the company's personnel director of Nottelson's predicament (A. 68). The personnel director indicated that the company would not deviate from the collective bargaining agreement (A. 68-71). Shortly thereafter, the company informed the union that it was willing to waive the union security clause provision as to Nottelson (A. 73).[2] On April 24, 1975, however, the company discharged Nottelson, pursuant to the union's request (Pet. App. A-3). This action followed.[3]

2. On December 20, 1976, the district court denied the union's motion to dismiss, holding that the rights of an individual employee under Title VII could not be "eliminated by the agreement between the union and his employer," and that, absent a showing of hardship, the union must attempt to accommodate a

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[2] The company proposed to the union that Nottelson be allowed to place his dues in escrow, pending litigation of the dispute (A. 76). The union rejected this proposal, which would not have been acceptable to Nottelson in any event (A. 76, 83, 211).

[3] After requesting Nottelson's discharge, the union "offered to remove [his] name from its membership listings, but insisted that [he] continue to pay an amount equal to the dues to [the] union 'for services both past and presently being rendered'" (Pet. Supp. App. B-3; see also Pet. App. A-10 n.8). Nottelson rejected this offer on religious grounds (Pet. Supp. App. B-3 to B-4).

Pursuant to a temporary restraining order entered by the district court, Nottelson returned to work on May 1, 1975. The restraining order, as extended, continued in force until July 10, 1975, when the district court denied Nottelson's motion for a preliminary injunction on the ground that the court lacked jurisdiction because the Commission had not issued a right-to-sue letter. Thus, Nottelson was again discharged on July 11, 1975 (Pet. App. A-3). Nottelson thereafter received a right-to-sue letter and filed an amended complaint on October 29, 1975 (*ibid.*).

religious objection to the payment of dues (423 F. Supp. at 1348). At trial, union officials defended the union's unwillingness to accommodate Nottelson by claiming, as a general matter, that an employee's exemption would allow him to receive the benefits of union representation without sharing the costs and thus would encourage "free riders" (Pet. App. A-9). Local president Blackman testified that he was aware that the AFL-CIO Executive Council had urged that religious objectors be accommodated, and that other unions had accommodated religious beliefs such as those of Nottelson, without suffering harm (*id.* at A-10). It was also established that the union has approximately 4,900 members, who pay monthly dues of $10 (A. 51, 183, 237), that the union would not be harmed by the loss of Nottelson's dues, and that no union members except Nottelson had objected to paying union dues and offered to pay the equivalent amount to charity (Pet. App. A-10). The local president guessed that exempting Nottelson might create a "steamroller effect" (*ibid.*). For its part, the company conceded that it would not have suffered any undue hardship if, with the union's consent, it had accommodated Nottelson's religious beliefs by exempting him from the union security clause (A. 410).

3. Based on the trial evidence and this Court's opinion in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), the district court held (Pet. Supp. App. B-14) that "the accommodation suggested by [Nottelson], whereby [he] would contribute an amount equal to union dues to a non-religious charity, does not constitute undue hardship within the meaning of 42 U.S.C. § 2000e(j)." The district court stated (Pet. Supp. App. B-14 to B-15):

> [Nottelson's] offer of accommodation would be only a *de minimus* [*sic*] cost to defendants. There is no evidence that many workers other than [Nottelson] would seek a similar accommodation due to their religious beliefs. Indeed, defendant union would lose only ten dollars a month, certainly a minimal amount, by allowing this single worker to pay that figure to a non-religious charity. In addition, [Nottelson] was not attempting to accept the benefits offered by defendant union as a free rider. He offered to fulfill this responsibility by contributing an amount equal to the union dues to a normal charity. As such, the cost to defendants of accepting [Nottelson's] offer would have been only *de minimus* [*sic*].

The court therefore found that, "[g]iven the reasonableness of [Nottelson's] offer of accommodation and its *de minimus* [*sic*] cost, defendants have failed to carry their burden of establishing that its acceptance would constitute an undue hardship within the meaning of the statute" (Pet. Supp. App. B-16 to B-17).

Prior to the entry of judgment, defendants moved for reconsideration on the ground, among other things, that Section 701(j) of Title VII, 42 U.S.C. 2000e(j), violated the Establishment Clause of the First Amendment. The district court rejected that argument (Pet. Supp. App. B-34 to B-35), following this Court's analysis in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 773 (1973).[4]

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[4] Each defendant also argued that the other should pay the full amount of the backpay liability, but the district court rejected these arguments on the ground that both defendants were culpable (Pet. Supp. App. B-35 to B-37).

4. The court of appeals affirmed by divided vote.[5] The court held that Section 701(j) of Title VII, 42 U.S.C. 2000e(j), creates an exception to the general authorization for union security clauses contained in the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and that both the company and the union were therefore required, absent undue hardship to them, to accommodate Nottelson's religiously motivated refusal to pay union dues (Pet. App. A-7). The court of appeals further held that, in determining whether the company and union had shown undue hardship, the district court had applied the correct legal standard, *i.e.*, whether accommodation would involve more than *de minimis* cost, and that the record fully supported the district court's findings that no undue hardship had been established (Pet. App. A-8 to A-12).

The court of appeals also upheld the constitutionality of Section 701(j) under the three-part test articulated in *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 772-773. The court concluded (Pet. App. A-13 to A-15; quoting also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971)) that: (1) the statute has a secular purpose—" 'to achieve equality of employment opportunities' "; (2) it does not impermissibly advance religion, but merely "reliev[es] * * * individuals of a special burden that others do not suffer by permitting them to fulfill their societal obligations in a different manner"; and (3) it does not foster "excessive government

[5] The court of appeals granted the Commission leave to intervene in this action on June 19, 1980 (Pet. App. A-6). The decision of the court of appeals was entered on February 27, 1981 (*id.* at A-1), and rehearing en banc was denied on April 20, 1981 (Pet. Supp. App. E-1 to E-2).

entanglement with religion."[6] Judge Pell dissented on constitutional grounds (Pet. App. A-18 to A-22).

ARGUMENT

Every court of appeals that has addressed the question has held that Section 701(j) of Title VII, 42 U.S.C. 2000e(j), requires that unions and employers exempt employees who object, on religious grounds, to the payment of union dues, unless such an accommodation would constitute undue hardship.[7] Not only is there no conflict among the circuits, but the issue lacks prospective importance because in December 1980, Congress amended Section 19 of the National Labor Relations Act, 29 U.S.C. 169, to create a significantly broader exemption for persons who object on religious grounds to the payment of union dues, and thereby readjusted the relationship between the provisions of Title VII and the National Labor Relations Act. Further review is therefore unwarranted at the present time.

1. a. As the court of appeals correctly held, Section 701(j) requires that employers and unions[8] ac-

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[6] The court of appeals held (Pet. App. A-12 to A-13), in the alternative, that its holding was required by *Rankins* v. *Commission on Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979).

[7] See *Anderson* v. *General Dynamics, Convair Aerospace Division*, 589 F.2d 397, 400-401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338, 341 (6th Cir. 1978); *Cooper* v. *General Dynamics, Convair Aerospace Division*, 533 F.2d 163, 169-170 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977).

[8] Although Section 701(j) does not specifically refer to *union* accommodation of employee religious practices, the union's obligation is based on Section 703(c)(1) of Title VII, 42 U.S.C. 2000e-2(c)(1) (a labor organization may not "ex-

commodate "*all aspects* of [employee] religious observance and practice" (Section 701(j) of Title VII, 42 U.S.C. 2000e(j); emphasis added). The plain language of the statute indicates "that it applies to all religious observances and practices and is not limited to claims of discrimination based on requirements of Sabbath work." *McDaniel* v. *Essex International, Inc.*, 571 F.2d 338, 342 (6th Cir. 1978); *Cooper* v. *General Dynamics, Convair Aerospace Division*, 553 F.2d 163, 168 (5th Cir. 1976). Cf. *Redmond* v. *GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978) ("we note that the very words of the statute * * * leave little room for * * * a limited interpretation").[9]

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clude or * * * expel from its membership, or otherwise discriminate against, any individual because of * * * religion * * *"), on Section 703(c)(2) of Title VII, 42 U.S.C. 2000e-2(c)(2) (a labor organization may not "limit, segregate, or classify its membership * * * in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee * * *, because of such individual's * * * religion * * *"), and on Section 703(c)(3) of Title VII, 42 U.S.C. 2000e-2(c)(3) (a labor organization may not "cause or attempt to cause an employer to discriminate against an individual in violation of this section").

[9] Petitioner A.O. Smith Corporation states (Pet. 50; emphasis in original): "It is noteworthy that as late as March 30, 1972, *after* the March 24, 1972 passage of § 701(j), the EEOC's position on this issue was that 'a union shop was not unlawful' and that a 'Charging Party's refusal [to pay dues] on religious grounds is protected by neither Title VII nor the First Amendment.' Sixth Annual Report, Equal Employment Opportunity Commission, p. 12 (1972)." As Local 19806 more accurately points out (Pet. 13), the statement contained in the 1972 Annual Report merely described a Commission determination that occurred in 1971, prior to the enactment of Section 701(j). Although the Commission

b. Both the company (Pet. 50-51) and Local 19806 (Pet. 14-17) seek to avoid the broad sweep of this provision by arguing that Congress' consideration of legislation to amend the National Labor Relations Act, with respect to the payment of union dues by religious objectors, shows that Congress did not intend Section 701(j) to apply in this area.[10] Thus, petitioners seek to understand Congress' intent in enacting Section 701(j) by canvassing the legislative history of these proposed amendments to the NLRA. See Local 19806 Pet. 14-17 & n.9. That legislative history is singularly unhelpful, however, because it neither contains any reference to Section 701(j) nor provides any explanation for this omission. Moreover, petitioners' reliance on post-enactment "legislative history" is incomplete at best because they ignore the legislative history of the December 1980 amendment[11] to the NLRA. Citing with approval the rele-

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had previously promulgated a guideline (29 C.F.R. 1605.1(b) (1967)) similar to Section 701(j), the Commission did not believe that its guidelines could create an exception to the National Labor Relations Act. However, such an exception was expressly created by Congress in 1972, when it enacted Section 701(j).

[10] Among other things, this argument ignores the difference in scope between 701(j) and the proposed NLRA amendments. For instance, unlike Section 701(j), the proposed NLRA amendments (see Local 19806 Pet. 14-15 n.9), including those enacted in 1974 and 1980, did not contain an undue hardship defense, and thus required exemption for religious objectors regardless of the resulting hardship to the union. Congressional action or inaction with respect to these bills is therefore irrelevant to the meaning of Section 701(j).

[11] Congress amended the NLRA on December 24, 1980 (see Pub. L. No. 96-593, 94 Stat. 3452) to provide a broad exemption for employees belonging to a "bona fide religion, body,

vant decisions of the courts of appeals, the sponsors of that amendment clearly indicated their understanding that Section 701(j) of Title VII also provides protection to union dues objectors.[12]

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or sect which has historically held conscientious objections to joining or financially supporting labor organizations" from payment of union dues or fees. The law provides that such employees may be required by a bargaining agreement to contribute a sum equal to union dues and fees to a nonreligious charity and pay costs incurred by unions in pursuing grievance-arbitration procedures where these are undertaken at the employee's request. Because the 1980 amendment to the NLRA has added another element to the overall regulatory scheme in this area, we believe that it would be appropriate for this Court to consider the questions raised here in a case in which the lower courts have considered the significance of this amendment (if a conflict in the circuits develops).

[12] See 126 Cong. Rec. S16616 (daily ed. Dec. 13, 1980) (remarks of Senator Melcher); 126 Cong. Rec. H760 (daily ed. Feb. 11, 1980) (remarks of Rep. Thompson: "[T]he bill would make the National Labor Relations Act consistent with section 701(j)" and the "option of allowing a qualifying individual the right to pay the equivalent of [union] dues to a nonreligious charity clearly constitutes a 'reasonable accommodation' to the individual's religious beliefs."); *ibid.* (remarks of Rep. Hinson: The "legislation reflects an accommodation among constitutional principles; the basic rights protected in Title VII * * *, [and] the rights created by the National Labor Relations Act * * *."); *id.* at H763 (remarks of Rep. Clausen: "[T]he purpose of this bill is to resolve any conflict and to express congressional intent as to the reasonableness of a charity substitution accommodation which all of the Federal courts of appeals ruling on the issue have found to be an accommodation acceptable under Title VII."); *ibid.* (remarks of Rep. Duncan: "The conscience amendment reconciles * * * the National Labor Relations Act and the * * * reasonable accommodation section, 43 USCA 2000e(j) [*sic*]."); *id.* at H764 (remarks of Rep. Erlenborn: "[T]his bill accepts the principles of religious liberty as guaranteed by our Constitution and implemented by the Equal Employment Opportunity Act.").

c. Finally, the court of appeals' holding that Section 701(j) affords some protection to employees who object on religious grounds to the payment of union dues is fully consistent with the well-established principle that our "national labor policy embodies the principles of nondiscrimination as a matter of highest priority." *Emporium Capwell Co.* v. *Community Organization*, 420 U.S. 50, 66 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). See *McDaniel* v. *Essex International, Inc.*, *supra*, 571 F.2d at 343; *Anderson* v. *General Dynamics, Convair Aerospace Division*, *supra*, 589 F.2d at 400-401. Petitioners stand this principle on its head when they contend that Congress' general (and earlier) authorization of union security arrangements in the National Labor Relations Act shows that Congress did not intend, despite the broad language used in Section 701(j), to allow even minor modifications of such arrangements when their effect is to discriminate against individuals whose deeply-held religious beliefs prevent them from paying union dues. Moreover, contrary to petitioners' contention, their argument is not supported by this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, *supra*, in which this Court held only that "[w]ithout a clear and express indication from Congress, we cannot agree * * * that an agreed upon *seniority system* must give way when necessary to accommodate religious observances" (432 U.S. at 79; emphasis added). In Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), Congress accorded special status to bona fide seniority systems and, for that reason, Section 701(j) does not invalidate a bona fide seniority system "even if the system has some discriminatory consequences" (432 U.S. at 82). However, Title VII contains no such exception relating to bona fide union security arrangements and Section 701(j)'s mandate of reasonable accom-

modation of "all aspects of religious observance" must therefore extend to religious objections to dues payments.[13]

2. The court of appeals also correctly held that Section 701(j) does not violate the Establishment Clause of the First Amendment. The requirement that employers reasonably accommodate their employees' religious practices, when accommodation imposes no more than a *de minimis* burden on others (*Trans World Airlines, Inc.* v. *Hardison, supra*, 432 U.S. at 84) is, as the court of appeals concluded, fully consistent with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience" (Pet. App. A-14; quoting *United States* v. *Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, J., dissenting)). As the court of appeals noted (Pet. App. A-14), the purpose and effect of Section 701(j) are modest: "Section 701(j) is * * * plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions where such relief will not unduly burden others." Indeed, each court of appeals to have considered the issue has upheld the constitutionality of Section 701(j). See *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981); *Anderson* v. *General Dynamics, Convair Aerospace Division*, 648 F.2d 1247 (9th Cir. 1981); *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), aff'd by an equally divided Court, 429 U.S. 65 (1976), vacated and remanded on other grounds, 433 U.S. 903 (1977).

Based on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison, supra*, 432 U.S. at 85, the

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[13] Not only does Title VII fail to grant a special status to union security arrangements, as it does to bona fide seniority systems, but (as the court of appeals recognized) broad exceptions to the general authorization of union security clauses are also found in the NLRA. See Pet. App. A-7.

court of appeals correctly recognized (Pet. App. A-14) that Section 701(j) simply describes more fully what is prohibited as religious discrimination under Title VII, and thereby includes adverse employment actions taken against persons whose religious observances conflict with work rules, if the conflict may be resolved without significantly burdening coworkers or imposing more than *de minimis* costs on unions or employers.[14] This provision clearly passes muster under *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 773 ("to pass muster under the Establishment Clause, the law in question, first, must reflect a clearly secular legislative purpose, * * * second, must have a primary effect that neither advances nor inhibits religion * * * and, third, must avoid excessive government entanglement with religion * * *").

a. In *Trans World Airlines, Inc.* v. *Hardison*, *supra*, 432 U.S. at 85, this Court identified the "paramount concern of Congress in enacting Title VII" as the "elimination of discrimination in employment" because of religion, race, sex, and national origin. The reasonable accommodation requirement of Section 701(j) serves the same clearly secular legislative purpose as that served by Title VII generally, for it does no more than define "religion" (so as to identify those circumstances in which religious practices may properly be taken into account) in a way reasonably calculated to ensure that employ-

[14] Of course, neither petitioner contends that Title VII's basic prohibition (Section 703(a) and (c), 42 U.S.C. 2000e-2(a) and (c)) of religion-based discrimination is either beyond the legislative power of Congress or an "establishment of religion." Likewise, Section 701(j) does not violate the Establishment Clause because it simply defines the conduct that constitutes such discrimination.

ment practices "fair in form, but discriminatory in operation" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 431), are effectively covered by the basic prohibition of Title VII.[15]

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[15] There is no merit to A.O. Smith's contrary assertion (Pet. 25-26) that "it is evident that the purpose of [Section 701(j)] was to aid certain sects by giving them a statutory 'right' to have their Sabbath practices accommodated by employers." Although A.O. Smith points to certain remarks of Senator Randolph, the sponsor of the legislation, which remarks (Pet. App. C-1 to C-9) do indeed evidence concern for the plight of certain Sabbatarian sects, a fair reading of the legislative history shows that these remarks were intended merely to be illustrative in the sense of presenting a specific example of the need for general legislation to further advance the goal of prohibiting religion-based employment discrimination. Indeed, in *Trans World Airlines, Inc.* v. *Hardison*, *supra*, 432 U.S. at 74-75, this Court had occasion to consider the legislative history of Section 701(j), and stated that "[t]he proponent of the measure, Senator Jennings Randolph, expressed his general desire 'to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law,' 118 Cong. Rec. 705 (1972)." The obvious secular purpose of Section 701(j) contrasts sharply with the clearly religious motivation underlying the state statutes that this Court has invalidated because of impermissible purpose. See *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 222-225 (1963) (purpose of state law requiring Bible reading in public schools is to promote religion); *Epperson* v. *Arkansas*, 393 U.S. 97, 107-108 (1968) (purpose of state law banning teaching of evolution in public schools was to promote the biblical theory of the origins of man); *Stone* v. *Graham*, 449 U.S. 39, 41, 42 (1980) (state statute requiring the posting of Ten Commandments in public schoolrooms violates Establishment Clause because the statute's "preeminent purpose"—"to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey * * * a sacred text in the Jewish and Christian faiths * * * is plainly religious").

b. Petitioners contend that Section 701(j) impermissibly favors certain religious sects over others and religious employees over non-religious because religious dues objectors, unlike other employees or other non-religious dues objectors, are permitted to receive the benefits of collective bargaining without paying dues. But petitioners fail to recognize that any accommodation, including those previously upheld by this Court, may be said to aid or benefit religious practice or groups in some sense. See, *e.g.*, *Gillette* v. *United States*, 401 U.S. 437, 462 (1971) (upholding exemption for religious conscientious objectors to service in the armed services); *Zorach* v. *Clauson*, 343 U.S. 306 (1952) (upholding release of students from public schools to attend religious centers for religious instruction or devotional exercise.)[16] Indeed, virtually any provision designed to give religious belief and practice breathing space in which to survive "aids" religious activity. However, as this Court has said, "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the [legislation], but whether its principal or primary effect advances religion." *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).

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[16] Such legislation has been upheld despite its indirect or incidental burden on non-accommodated parties. For example, when conscientious objectors are exempted from service in the armed forces, others necessarily will be required to serve in their stead. *Gillette* v. *United States*, *supra*, 401 U.S. at 448-450. Similarly, churches may be exempted from property taxes, thus presumably increasing the amount that other property owners must pay. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). The minor adjustments required in this case, permitting the diversion of union dues to a charitable organization for a person whose religion forbids contributions to unions, are certainly no more significant than those that have previously been upheld under the First Amendment.

Section 701(j) does no more than extend equal employment opportunity protection to a class of individuals whose religious observances might otherwise needlessly cost them their jobs. This Court has recognized that there is a constitutional difference between the active support or "direct and substantial advancement" (*Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 783 n.39) prohibited by the Establishment Clause, and the "indirect or remote" effect of essentially defensive protection such as that afforded by Section 701(j). See *Wisconsin* v. *Yoder*, 406 U.S. 205, 234-235 n.22 (1972).[17]

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[17] At all events, petitioners' contention that Section 701(j) impermissibly benefits religious objectors, while impermissibly burdening others, ignores the record facts here. Under the approved accommodation, Nottelson will expend the same amount of "dues" as his union co-workers. Moreover, there was no showing that the diversion of Nottelson's dues to charity would require any increase in the amount required to be paid by the other members (Pet. App. A-10). Indeed, the court of appeals noted (*ibid.*) that even if dues had to be raised as a result of this accommodation, the cost of any such "subsidization" would be *de minimis* (2.4 cents per year per member). Because Nottelson must pay the same amount that union members pay, others will not be encouraged to take the same course, absent similar religious beliefs. Moreover, the alternative to this accommodation—the discharge of Nottelson from his employment—is contrary to the fundamental policy of Title VII in that such a discharge would be based upon his adherence to his religious beliefs and, obviously, totally unrelated to his ability to do his job. Finally, the contention of Local 19806 (Pet. 22), that this case presents the Court with the important task of "harmoniz[ing] *Gillette* [which upholds the selective exemption] with the line of cases invalidating 'special economic benefits' to particular religious sects" is specious. This case does not involve diversion of union funds to religious institutions or financial support of religious activity of any sort.

A.O. Smith also contends (Pet. 28-31) that, because the obligation relieved by Section 701(j) is not one imposed by the government, the Establishment Clause prohibits the government from legislating affirmatively to relieve this burden. However, governmental action to accommodate the religious practices of its own employees—which requires other government employees to make the necessary adjustment—does not impermissibly tip the balance toward government establishment of religion. *Rankins* v. *Commission of Professional Competence*, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, appeal dismissed for want of a substantial federal question, 444 U.S. 986 (1979). If the government may reasonably accommodate the religious observances of its own employees without violating the Establishment Clause, the government must also be free to require private employers to do the same thing to prohibit religious-based discrimination in interstate commerce. In each instance, the reasonable accommodation merely implements societal "neutrality in the face of religious differences." *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963); *Thomas* v. *Review Board of the Indiana Employment Security Division*, No. 79-952 (Apr. 6, 1981), slip op. 12.[18]

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[18] We note, of course, that the burden that was relieved here by Section 701(j)—the mandatory payment of union dues—arises from an obligation that has been sanctioned by federal labor law and policy. See *Linscott* v. *Miller Falls Co.*, 440 F.2d 14, 16-17 (1st Cir.), cert. denied, 404 U.S. 872 (1971). See also *Buckley* v. *American Federation of Television and Radio Artists*, 496 F.2d 305, 311 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); *Railway Employees' Department* v. *Hanson*, 351 U.S. 225, 232 (1956). In the absence of Section 701(j), therefore, "if the company declined to discharge the plaintiff [because he refused to pay union dues], the union

c. The court of appeals properly held (Pet. App. A-15) that Section 701(j) does not foster excessive government entanglement with religion because "[t]he government is required only to determine whether a belief is "religious" within the meaning of the statute * * * and whether it is sincerely held." Courts routinely are required to undertake such an inquiry to adjudicate claims arising under the Free Exercise and Establishment Clauses, such as, for instance, claims involving statutory tax exemptions for religious institutions and conscientious objector status under the laws relating to conscription.

The entanglement doctrine has been invoked only where legislation requires that the government intrude excessively into the affairs of religious institutions. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977); see also *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971). Government intrusion has been held "excessive" where it entails pervasive monitoring of such institutions by secular authorities and, therefore, carries the threat of government direction and control of religion—precisely the evil at which the Establishment Clause is aimed. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616-620; *NLRB* v. *Catholic Bishop of Chicago*, *supra*, 440 U.S. at 503. As the court of appeals correctly held, a court's determination of the religious nature of a

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could institute a federally supported suit, if not an unfair labor practice charge, for failure to live up to its bargaining agreement." *Linscott* v. *Miller Falls Co.*, *supra*, 440 F.2d at 17. Thus, even if the state may constitutionally mandate accommodation only with respect to burdens imposed by it, this "imprimatur of the federal law" (*Railway Employees' Department* v. *Hanson*, *supra*, 351 U.S. at 232) justifies Congress' decision to relieve the burden thus imposed upon those who object on religious grounds to the payment of union dues.

Title VII plaintiff's practices or beliefs involves no similar interference with religious institutions. See generally *United States* v. *Seeger*, 380 U.S. 163 (1965); *Welsh* v. *United States*, 398 U.S. 333 (1970).

3. A.O. Smith also contends that the courts below erred in finding that it could have accommodated Nottelson's beliefs without undue hardship. In part, the company contends (Pet. 46) that an employer can establish an undue hardship defense, as a matter of law, by showing that accommodation would require its unilateral departure from a collective bargaining agreement. However, this argument is clearly inconsistent with the well established principle (Pet. App. A-11; citations omitted) "that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations." See *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969); *Norman* v. *Missouri Pacific R.R.*, 414 F.2d 73, 80-84 (8th Cir. 1969); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971); cf. *Alexander* v. *Gardner-Denver Co.*, *supra*. Thus, an employer is not immune from liability under Title VII simply because its discriminatory policy is embodied in a collective bargaining agreement. Moreover, to the extent that A.O. Smith argues that, as a matter of fact, it would be subject to more than *de minimis* harm if it were to accommodate Nottelson, that factual question was decided adversely to the company by both courts below and does not therefore warrant review by this Court. *Berenyi* v. *INS*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Indeed, both courts below applied the legal standard set forth in *Hardison*:

undue hardship exists where the cost imposed by the accommodation is more than *de minimis* (Pet. App. (A-9; Pet. Supp. App. B-14).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 356461 632